80-595

No. .....

Supreme Court, U. S.
FILED
OCT 14 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARTLET SMITH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DUANE MILLER
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Counsel of Record for Petitioner

October, 1980

QUESTIONS PRESENTED

1. Whether it was reasonable error for a government witness to testify he had been threatened and harrassed by someone other than the petitioner?

2. Whether it was reasonable error for the trial court to refuse to allow petitioner to argue the theory of his defense?

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ARTLET SMITH,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Artlet Smith, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit rendered in these proceedings on August 12, 1980. Petition for Rehearing denied on September 12, 1980.

OPINIONS BELOW

The opinions of the Court of Appeals, as yet unreported, appears at Appendix A, *infra*, pp. A-1 through A-6. The opinion of the District Court for the Western District of Oklahoma appears at Appendix, p. A-7.

JURISDICTION

The order or judgment of the Court of Appeals for the Tenth Circuit was entered on the 12th day of August, 1980, and Petition for Rehearing was denied September 12, 1980. This Petition for Certiorari was filed less than 30 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

Rule 30, Federal Rules of Criminal Procedure:

> "At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to adverse parties. The Court shall inform counsel of its proposed action upon the requests, prior to their arguments to the jury, but the Court shall instruct the jury after the arguments are completed. He party may assign as error any portion of the charge or admission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury."

STATEMENT OF THE CASE

1. Nature of the Case

The petitioner, Artlet Smith, was tried by a jury, in the United States District Court for the Western District of Oklahoma, and was found guilty of a violation of Title 21, U.S.C. § 841(a)(1), Distribution of a Schedule II Controlled Substance, *i.e.,* Cocaine, and was sentenced to ten (10) years imprisonment by the Honorable Luther Eubanks. At the same trial, petitioner was also tried on a separate four-count indictment which resulted in a mistrial as the jury was unable to reach a verdict and these charges in their entirety have now been dismissed.

2. Statement of the Facts

On the 19th day of September, 1978, Oklahoma City Police Officer, Charlie Barry, working in an undercover capacity, with an acquaintance of the petitioner's, Ernestine Gains, went to the petitioner's residence and met with petitioner (R. pp. 132-169). Officer Barry explained to petitioner that Ernestine Gains' husband was in jail (R. p. 169). Officer Barry asked petitioner to give Barry some cocaine so Barry could sell it, then giving the proceeds to Ernestine Gains to use to make bond for her husband (R. p. 134). Petitioner acknowledged he knew Ernestine Gains' husband and agreed to give Barry some cocaine to enable Mrs. Gains' husband to be released from jail (R. p. 170). Officer Barry was given a small quantity of cocaine, which was the basis for the charge of which petitioner has been convicted and sentenced to ten (10) years confinement.

A government witness was allowed to testify in response to government questioning that he had been forced to leave Oklahoma City and go to Dallas, Texas, because a contract had been put out to "do something to me"; that his house had bricks thrown through the windows and his mother's house had been shot into and that he was scared all the time (R. pp. 100, 101). All of this testimony was allowed over the objection of the petitioner. There was no evidence linking petitioner to these threats and acts of violence.

Counsel for petitioner, at the proper time, submitted to the court a requested instruction on the defense of entrapment. This was petitioner's sole theory of defense as to the count of which he was convicted. Just prior to arguing the case to the jury, counsel was advised by the court that an entrapment instruction would not be given. At the conclusion of arguments, the court then did give an entrapment instruction, the effect of which was to preclude defense counsel from arguing his theory of defense to the jury (R. pp. 186, 194-205, 219).

REASONS FOR GRANTING THE WRIT

1. Our courts have held in *United States* v. *Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979); *United States* v. *Davis*, 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert .denied*, 410 U.S. 989 (1973), that evidence of threats to a prosecution witness is admissible as showing consciousness of guilt if, and only if, a direct connection is established between the defendant and the threat. In this case, there was no such connection established. The

witness testified that he had no idea who might be behind these threats (R. p. 114).

The Tenth Circuit Court of Appeals in setting out its reasons for not following the above established law in this area, stated counsel did not object to this testimony on grounds of prejudice. However, with all due respect, the transcript shows this objection to have been made and overruled (R. pp. 100, 101).

The Circuit Court further stated that any prejudice resulting from the testimony was minimized when it was further developed by petitioner's counsel; but, the only question asked by petitioner's counsel on the matter was to elicit the response that petitioner was not involved in these threats and acts of violence to the witness (R. p. 114).

2. Rule 30 of the Federal Rules of Criminal Procedure provides that the trial court shall advise counsel prior to argument of its proposed action on requested instruction so counsel will be advised of the limits of argument.

The trial court clearly did not follow Rule 30 and gave as its reason:

> "But I don't believe that that's an error because the Court is not legally obligated, I don't believe, to tell counsel what the instructions are going to be in any case" (R. p. 238).

The trial court's failure to comply with Rule 30 constitutes reversible error if the party was unfairly prevented from arguing his defense to the jury or was substantially misled in formulating his argument. *United States* v. *Pommerening*, 500 F.2d 92 (10th Cir. 1974); *Whitlock* v. *United States*, 429 F.2d 942 (10th Cir. 1970).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit Court of Appeals.

Respectfully submitted,

DUANE MILLER
3609 N.W. 70th
Oklahoma City, Oklahoma 73116
(405) 843-7365
Attorney for Petitioner

October, 1980

CERTIFICATE OF SERVICE

I, the undersigned below, have made Service of this Petition by placing three (3) copies of the same in the U.S. Mail, postage fully prepaid, and addressed to the following:

Larry Patton
United States Attorney
Federal Court House
Oklahoma City, Oklahoma 73102

The Solicitor General
Department of Justice
Washington, D.C. 20530

this _____ day of October, 1980.

All parties required to be served have been served.

_____
Duane Miller

APPENDIX

[Filed August 12, 1980]

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 79-1578
ARTLET SMITH, Defendant-Appellant.	)	

Appeal from the United States District Court
for the Western District of Oklahoma
(D.C. No. CR-79-0047-E)

Submitted on the Briefs:

Duane Miller, Oklahoma City, Oklahoma, for Defendant-Appellant.

Larry D. Patton, United States Attorney, and William S. Price, Assistant United States Attorney, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before SETH, Chief Judge, PICKETT, and SEYMOUR, Circuit Judges.

SEYMOUR, Circuit Judge.

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the

determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 10(e). The cause is therefore ordered submitted without oral argument.

The defendant, Artlet Smith, was convicted after a jury trial of violating 21 U.S.C. § 841(a)(1) by distributing cocaine to an undercover agent, Charlie Barry. In the same proceeding, a mistrial was declared as to four separate charges: two counts of distributing cocaine to an informant, William Young, and two counts of violating 21 U.S.C. § 843(b) by using the telephone to facilitate the sales to Young. We affirm the conviction.

On Appeal, Smith uges two grounds for reversal. He alleges that evidence of deeds of misconduct and offenses not charged in the indictments was improperly admitted. He also argues that although the trial court ultimately gave an instruction on entrapment, it erred by advising counsel before closing argument that it would not give the requested instruction. Smith contends that his counsel was thereby precluded from fully arguing his theory of defense to the jury.

I.
Evidentiary Issues

"The materiality and relevance of proffered evidence resides in the sound discretion of the trial court, and an appellate court is bound to uphold the decision absent a clear abuse of discretion." *United States* v. *Martinez*, 487 F.2d 973, 977 (10th Cir. 1973). In the exercise of this discretion the court must determine whether the probative value of evidence is substantially outweighed by the danger of prejudice. Rule 403, Fed. R. Evid.; *United States* v. *Krohn*, 573 F.2d 1382, 1389 (10th Cir.), *cert. denied*, 436 U.S. 949 (1978).

Smith contends it was error to admit evidence of an incident between Smith and the informant Young. Young testified that two weeks prior to trial, Smith followed

Young home in his car, pulled into his driveway and made intimidating remarks and gestures. Evidence of threats to a prosecution witness is admissible as showing consciousness of guilt if a direct connection is established between the defendant and the threat, as it was here. *United States* v. *Rios*, 611 F.2d 1335, 1349 (10th Cir. 1979); *United States* v. *Davis*, 487 F.2d 112, 125 (5th Cir. 1973), *cert. denied*, 415 U.S. 981 (1974); *United States* v. *Cirillo*, 468 F.2d 1233, 1240 (2d Cir. 1972), *cert. denied*, 410 U.S. 989 (1973).

More troublesome is Young's testimony that he was harassed and threatened by unidentified people in the drug community due to his informant activities. As pointed out in *Rios*, such testimony is generally not properly admissible when the conduct is not attributable to the defendant. However, defense counsel did not object to this testimony on the ground of prejudice. Moreover, he began his cross-examination by asking Young additional questions about his life as an informer and its undesirable consequences. Thus, any prejudice resulting from the original testimony was minimized when it was further developed by defense counsel. *See United States* v. *Sturgis*, 578 F.2d 1296, 1299 (9th Cir. 1978).

In addition, we noted above that the charges against Smith for distributing cocaine to informant Young were the subject of a mistrial. The mistrial was based on the jury's failure to reach an unanimous verdict as to Smith's guilt. If the jury failed to believe Young's testimony that he sold cocaine to Smith, it is highly unlikely that Young's testimony about anonymous threats and intimidation influenced the jury in finding Smith guilty of the sale to Barry, the police undercover agent. Under these circumstances, and in view of the overwhelming evidence of guilt in the sale to Barry, we find any error relating to admission of Young's testimony to be harmless. *See United States* v. *Lyles*, 593 F.2d 182, 196 (2d Cir.), *cert. denied*, 440 U.S. 972 (1979); *Chase* v. *Crisp*, 523 F.2d 595, 598 (10th Cir. 1975), *cert. denied*, 424 U.S. 947 (1976).

Smith also urges as error the admission of taped telephone conversations between undercover agent Barry and Smith because they included references to unrelated drug transactions. The phone calls were made two days after the sale for which Smith was tried, and referred to that sale as well as other potential sales of marijuana and cocaine from Smith to Barry. Under Rule 404(b), Fed. R. Evid., evidence of other crimes is admissible "as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The admission of such evidence requires the trial court to weigh the probative value against the prejudicial effect. *United States v. Bridwell*, 583 F.2d 1135, 1140 (10th Cir. 1978). Smith's defense to the Barry sale was that he only sold the cocaine upon Barry's urging, and did so to enable Barry to resell the drug and raise enough money to make bail for the husband of a mutual friend. The evidence of Smith's willingness and ability to make other sales was clearly relevant to show a plan or ongoing scheme to distribute drugs in order to refute this defense. The close proximity in time between the sale charged and the evidence of other proposed sales made the evidence highly probative. *Id.*

We conclude that the trial court did not abuse its discretion by admitting this relevant evidence, particularly in view of the instruction to the jury limiting its consideration to the purposes permitted by Rule 404(b).

II.

The Entrapment Instruction

As noted above, Smith's entrapment defense was based on his contention, that Barry induced him to make the sale to enable Barry to raise bail for a mutual friend. After the government rested its case, Smith's counsel moved for an acquittal. He renewed the motion prior to closing arguments, and also asked the trial court to rule on his requested entrapment instruction. The trial judge indicated he was undecided whether to give the instruction but

doubted that he would. Up to this point in the proceedings, Smith had not admitted making the sale to Barry. "The law is well settled in this circuit that if the defendant denies the commission of the crime charged, the defense of entrapment is not available to him." *Munroe* v. *United States*, 424 F.2d 243, 244 (10th Cir. 1970). Thus the tentative decision by the trial judge not to give an entrapment instruction was not error.

In his closing argument, defense counsel admitted for the first time that Smith had indeed sold cocaine to Barry. He then argued that Smith only made the sale because he thought he was helping a friend and would not have done it otherwise. Thereafter, the trial judge gave an entrapment instruction to the jury. He subsequently indicated he became convinced after closing arguments that the instruction should be given because commission of the offense was tacitly admitted and entrapment argued.

Smith now urges that the trial court failed to comply with Rule 30, Fed. R. Crim. P., which requires the court to "inform counsel of its proposed action upon the requests [for jury instructions] *prior* to their arguments to the jury. . . ." (Emphasis added). Smith argues that had he known the entrapment instruction would be given, he would have argued this theory more vigorously to the jury in his closing. He also contends that he should have been given an opportunity to reopen his argument after the entrapment instruction had been given.

The trial court's failure to comply with Rule 30 constitutes reversible error only if the party was unfairly prevented from arguing his defense to the jury or was substantially misled in formulating his arguments. *United States* v. *Pommerening*, 500 F.2d 92 (10th Cir. 1974); *Whitlock* v. *United States*, 429 F.2d 942 (10th Cir. 1970). Here the trial court's tentative decision not to give the instruction did not prevent Smith from presenting what was essentially an entrapment defense in his closing argument.

Therefore, we do not believe the trial court's indecision substantially misled Smith in presenting his defense.

Smith argues on appeal that he should have been permitted to reopen his closing argument so as to pursue his entrapment theory more vigorously. In *Downie* v. *Powers*, 193 F.2d 760, 767 (10th Cir. 1951), we stated that the opportunity to reopen should be given if justice requires the facts to be reargued in light of the changed law of the case. Smith does not contend that he would have restructured his argument, but only that he would have argued more vigorously and completely. Moreover, he made no request to the trial judge to reopen his closing argument after the entrapment instruction was given. Under these circumstances, we do not find reversible error.

Affirmed.

JULY TERM—September 12, 1980

Before Honorable Oliver Seth, Chief Judge, Honorable John C. Pickett, and Honorable Stephanie Seymour, Circuit Judges

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
vs.	)	No. 79-1578
	)	
ARTLET SMITH,	)	
Defendant-Appellant.	)	

This matter comes on for consideration of appellant's petition for rehearing filed in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied.

(s) Howard K. Phillips
HOWARD K. PHILLIPS, Clerk

United States of America vs.

United States District Court

the WESTERN DISTRICT OF OKLAHOMA

DEFENDANT: ARTLET SMITH

DOCKETED

DOCKET NO.: CR. 79-47-E

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: May, DAY: 22, 1

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant des have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Duane Miller (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~XXXX~~/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of violation of Title 21, U.S.C., Section 841(a)(1) (distribution of Schedule II controlled substance i.e. cocaine) as charged in the one count Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the con was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defen is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

ten (10) years on the one count Indictment, or until the defendant is otherwise discharged as provided by law, with a special parole term of three (3) years after defendant is released from confinement

IT IS ORDERED that the appeal bond of the defendant be fixed in the amount of $20,000.00 cash or surety.

IT IS FURTHER ORDERED that the appearance bond of the defendant be exonerated.

SPECIAL CONDITIONS OF PROBATION

IT IS ORDERED that the defendant be remanded to the custody of the U. S. Marshal.

Filed: May 22, 1979
Herbert T. Hope, Clerk

By Deborah R. Kirby
Deputy

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, a any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and re probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk delive a certified copy of this judgmen and commitment to the U.S. Mar shal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

Date May 22, 1979